

Center for WorkLife Law and ACLU, in Partnership with NELA

Understanding and Using the EEOC's New Pregnant Workers Fairness Act (PWFA) Regulations

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I. The Pregnant Workers Fairness Act (PWFA) – The Basics

- 42 U.S.C. § 2000gg *et seq.*
- 42 U.S.C. § 2000gg-1(1)-(5): Nondiscrimination with regard to reasonable accommodations
 - (1) Failure to make reasonable accommodations to the “known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee, unless . . . [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of [its] business”
 - (2) Require the employee to accept an accommodation other than one identified through the interactive process
 - (3) Deny employment opportunities based on the employee’s need for accommodation
 - (4) Require the employee to take leave “if another reasonable accommodation can be provided”
 - (5) Take “adverse action in terms, conditions, or privileges of employment” because the employee requests or uses an accommodation
- 42 U.S.C. § 2000gg-2(f)(1) & (2): Prohibition on retaliation and coercion
 - PWFA is a floor, not a ceiling, 42 U.S.C. § 2000gg-5(a)(1): “Nothing in this chapter shall be construed to invalidate or limit the powers, remedies, and procedures under any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for individuals affected by pregnancy, childbirth, or related medical conditions”
- EEOC: What You Should Know About the PWFA, <https://www.eeoc.gov/wysk/what-you-should-know-about-pregnant-workers-fairness-act>
- Center for WorkLife Law, ACLU, and NELA prior webinars in our PWFA/PUMP series, <https://www.nela.org/programs-events/series-pwfa-pump/>
- For additional guidance in identifying potential accommodations, engaging in the interactive process, and working with health providers to obtain PWFA-compliant medical certifications, consult the Center for WorkLife Law’s clearinghouse, <https://pregnantatwork.org/>.
 - *See also* Job Accommodation Network, <https://askjan.org/>.

II. The Final Rule – The Basics

- 89 Fed. Reg. 29096 (Apr. 19, 2024) (available at <https://www.federalregister.gov/documents/2024/04/19/2024-07527/implementation-of-the-pregnant-workers-fairness-act>)
- 29 C.F.R. § 1636 *et seq.*
- Effective date: June 18, 2024

- EEOC: Summary of Key Provisions of EEOC’s Final Rule, <https://www.eeoc.gov/summary-key-provisions-eeocs-final-rule-implement-pregnant-workers-fairness-act-pwfa>

III. **“Pregnancy, childbirth, and related medical conditions”**

- Same meaning as under the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (“PDA”), as interpreted by precedent and EEOC guidance
- 29 § C.F.R. 1636.3(b):

[Under the PWFA], “[p]regnancy” and “childbirth” refer to the pregnancy or childbirth of the specific employee in question and include, but are not limited to, current pregnancy; past pregnancy; potential or intended pregnancy (which can include infertility, fertility treatment, and the use of contraception); labor; and childbirth (including vaginal and cesarean delivery). “**Related medical conditions**” are medical conditions relating to the pregnancy or childbirth of the specific employee in question. The following are examples of conditions that are, or may be, “related medical conditions”: termination of pregnancy, including via miscarriage, stillbirth, or abortion; ectopic pregnancy; preterm labor; pelvic prolapse; nerve injuries; cesarean or perineal wound infection; maternal cardiometabolic disease; gestational diabetes; preeclampsia; HELLP (hemolysis, elevated liver enzymes and low platelets) syndrome; hyperemesis gravidarum; anemia; endometriosis; sciatica; lumbar lordosis; carpal tunnel syndrome; chronic migraines; dehydration; hemorrhoids; nausea or vomiting; edema of the legs, ankles, feet, or fingers; high blood pressure; infection; antenatal (during pregnancy) anxiety, depression, or psychosis; postpartum depression, anxiety, or psychosis; frequent urination; incontinence; loss of balance; vision changes; varicose veins; changes in hormone levels; vaginal bleeding; menstruation; and **lactation and conditions related to lactation**, such as low milk supply, engorgement, plugged ducts, mastitis, or fungal infections. **This list is non-exhaustive.**

- Interpretive Guidance, Section III ¶¶ 15-22 & nn. 23-27.

IV. **The Mechanics of Initiating the Accommodation Process, and Identifying a Reasonable Accommodation**

A. **“Known Limitation”**

- 29 C.F.R. § 1636.3(a): “*Known limitation* means a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions that **the employee or the employee’s representative has communicated** to the covered entity, whether or not such condition meets the definition of disability specified in section 3 of the Americans with Disabilities Act of 1990, 42 U.S.C. 12102.”

- “*Known* . . . means the employee or the employee’s representative has communicated the limitation to the employer.” 29 C.F.R. § 1636.3(a)(1).
- 29 C.F.R. § 1636.3(a)(2): “*Limitation* means a physical or mental condition **related to, affected by, or arising out of** pregnancy, childbirth, or related medical conditions of the specific employee in question. “Physical or mental condition” is an impediment or problem that **may be modest, minor and/or episodic**. The physical or mental condition may be that an employee has a **need or a problem related to maintaining their health or the health of the pregnancy**. The definition also includes when an employee **is seeking health care** related to pregnancy, childbirth or a related medical condition itself. The physical or mental condition can be a limitation **whether or not such condition meets the definition of disability** specified in section 3 of the Americans with Disabilities Act of 1990, 42 U.S.C. 12102.”
 - Interpretive Guidance, Section III ¶¶ 3-22; *id.* ¶ 29 (“Many, but not all, conditions related to pregnancy and childbirth can be both a “limitation” and a “related medical condition.”).
 - Interpretive Guidance, Section III ¶¶ 146-48; Section VI ¶¶ 7-20; Exs. 77-78 (detailing interplay between PWFA and ADA, including when worker’s pregnancy-related “known limitation” also qualifies as a disability under the ADA)
- 29 C.F.R. 1636.3(d): “*Communicated to the employer* . . . means an employee or the employee’s representative has made the employer aware of the **limitation by communicating with a supervisor, a manager, someone who has the supervisor authority for the employee or who regularly directs the employee’s tasks (or the equivalent for an applicant), human resources personnel, or another appropriate official**, or by following the steps in the covered entity’s policy to request an accommodation.”
 - The “communication” can be oral, written, or made “by another effective means.” It need not “be in any specific format, use specific words, or be on a specific form.” *Id.* § 1636.3(d)(1) & (2).
- Interpretive Guidance, Section III ¶¶ 23-28.
 - “Informing the employer of the limitation and requesting a reasonable accommodation should not be complicated or difficult.” *Id.* ¶ 25.
 - The direction that “no specific words” need be used to convey the limitation “includes not needing to specifically identify whether a condition is ‘pregnancy, childbirth, or related medical condition,’ or whether it is a ‘physical or mental condition.’” *Id.* ¶ 28.

- “. . . PWFA limitations also may be ADA disabilities. Therefore, an employee is not required to identify the statute under which they are requesting a reasonable accommodation. Doing so would require that employees seeking accommodations use specific words or phrases, which § 1636.3(d) prohibits.” *Id.* ¶ 31 (internal citation omitted).

B. Requesting a reasonable accommodation

- 42 U.S.C. § 2000gg(7): “Reasonable accommodation” = same meaning as under the ADA
- 29 C.F.R. § 1636.3(h)(2) & (3): “To request a reasonable accommodation, the employee or employee’s representative need only communicate to the covered entity that the employee needs an adjustment or change at work due to their limitation To determine the appropriate reasonable accommodation, it may be necessary for the covered entity to initiate an informal, interactive process”
 - Interpretive Guidance, Section III ¶¶ 56-57; Exs. 6-11.
- 29 C.F.R. § 1636.3(k): “*Interactive process* means an informal, interactive process between the covered entity and the employee seeking an accommodation This process should identify the known limitation under the PWFA and the adjustment or change at work that is needed due to the limitation, if either of these is not clear from the request, and potential reasonable accommodations. **There are no rigid steps that must be followed.**”
 - Interpretive Guidance, Section III ¶¶ 105-17 & Examples 51-53.
 - “In many instances, the appropriate reasonable accommodation may be obvious to either or both the employer and the employee with the known limitation so that the interactive process can be a brief discussion. The request and granting of the accommodation can occur in a single informal conversation.” Interpretive Guidance, Section III ¶ 107 (footnote omitted).
 - Interpretive Guidance, Section III ¶¶ 111-14 (“Recommendations for an Interactive Process”).

C. Examples of reasonable accommodations

- 29 C.F.R. § 1636.3(h)-(i)
 - Section 1636.3(i)(1): “Making existing facilities . . . readily accessible to and usable by employees with known limitations”
 - Section 1636.3(i)(2): Detailed, non-exhaustive list of potential accommodations
 - Section 1636.3(i)(3): Leave as accommodation
 - Section 1636.3(i)(4): Accommodations related to lactation
 - Section 1636.3(i)(5): “The temporary suspension of one or more essential functions of the position in question, as defined in paragraph (g) of this section, is

a reasonable accommodation if an employee with a known limitation under the PWFA is unable to perform one or more essential functions with or without a reasonable accommodation and conditions set forth in [Section 1636.3(f)(2)] are met.”

- Interpretive Guidance, Section III ¶¶ 53-55, 58-73, 81-82; Exs. 12-22; 26-44.
 - Interpretive Guidance, Section III ¶ 81 & n. 102 (discussing accommodation of lactation and interaction of PWFA with PUMP Act).
- Interim accommodations: The Final Rule directs that interim accommodations are “a best practice” when there is a delay in providing a reasonable accommodation – and cautions that a failure to provide an interim accommodation may support a finding that the employer has effectively denied an accommodation, triggering liability under 42 U.S.C. § 2000gg-1(1), or has violated the statute’s prohibition on retaliation and coercion under 42 U.S.C. § 2000gg-2(f).
 - Interpretive Guidance, Section III ¶¶ 74-80; Exs. 23-25.

D. Undue hardship

- 42 U.S.C. § 2000gg(7): “Undue hardship” = same meaning as under the ADA
- 29 C.F.R. § 1636.3(j)(1): “Undue hardship means, with respect to the provision of an accommodation, significant difficulty or expense incurred by a covered entity, when considered in light of the factors set forth [Section 1636.3(j)(2)].”
 - *Id.* § 1636.3(j)(2)(i) – (v): Factors to be considered
 - *Id.* § 1636.3(j)(3): Factors to be considered in assessing undue hardship of accommodating employee who is temporarily unable to perform the essential functions of the job
 - Interpretive Guidance, Section III ¶¶ 83-92; Exs. 45-47
 - Interpretive Guidance, Section III ¶ 83: “Because the definition of undue hardship under the PWFA follows the ADA, under the PWFA the term ‘undue hardship’ means significant difficulty or expense in, or resulting from, the provision of the accommodation. The ‘undue hardship’ provision takes into account the financial realities of the particular employer or other covered entity. However, the concept of undue hardship is not limited to financial difficulty. ‘Undue hardship’ refers to any accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business.”
 - *Id.* ¶ 84: “Whether a particular accommodation will impose an undue hardship for a particular employer is determined on a case-by-case basis. Consequently, an

accommodation that poses an undue hardship for one employer at a particular time may not pose an undue hardship for another employer, or even for the same employer at another time.” (Footnote omitted.)

- *Id.* ¶ 86 & n.114: Employees’, clients’, or customers’ bias toward the employee affected by pregnancy, childbirth, or related medical conditions will not support a showing of undue hardship
 - *But see id.* (“Employers, however, may be able to show undue hardship where the provision of an accommodation would be unduly disruptive of other employees’ ability to work.”)
- *See also* 29 C.F.R. § 1636.3(j)(4): Predictable assessments
 - In “virtually all cases,” the following modifications will be found not to impose an undue hardship, and therefore, “the individualized assessment should be particularly simple and straightforward”:
 - (i) Allowing an employee to carry or keep water near and drink, as needed;
 - (ii) Allowing an employee to take additional restroom breaks, as needed;
 - (iii) Allowing an employee whose work requires standing to sit and whose work requires sitting to stand, as needed; and
 - (iv) Allowing an employee to take breaks to eat and drink, as needed.
 - Interpretive Guidance, Section III ¶¶ 93-96; Exs. 48-50

E. “Qualified” notwithstanding temporary inability to perform essential functions of the job

- 42 U.S.C. § 2000gg(6)(A)–(C): An employee may be “qualified” notwithstanding their temporary inability to perform the essential functions of the job if:
 - Any inability to perform the essential function is for a “temporary” period;
 - The essential function could be performed “in the near future”; and
 - The inability to perform the essential function can be reasonably accommodated.
- 29 U.S.C. § 1636.3(f)(2)
 - “In the near future”: “This determination is made on a case by case basis. **If the employee is pregnant**, it is presumed that the employee could perform the essential function(s) in the near future because they could perform the essential function(s) within generally 40 weeks of its suspension” *Id.* § 1636.3(f)(2)(ii).
- Interpretive Guidance, Section III ¶¶ 37-51; Exs. 1-5

- “In the near future”: “**For conditions other than a current pregnancy**, the Commission is not setting a specific length of time for ‘in the near future’ because, unlike a current pregnancy, there is not a consistent measure of how long these diverse conditions can generally last, and thus, what ‘in the near future’ might mean in different instances.” *Id.* ¶ 45.
- “[T]he Commission recognizes that employees may need an essential function(s) temporarily suspended because of a current pregnancy; take leave to recover from childbirth; and, upon returning to work, need the same essential function(s) or a different one temporarily suspended due to the same or a different physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. . . . [T]he **determination of ‘in the near future’ should be made when the employee asks for each accommodation that requires the suspension of one or more essential functions.**” *Id.* ¶ 47.

V. Employer requests for supporting documentation

- 29 C.F.R. § 1636.3(l)
- An employer is **not required** to request supporting documentation
- An employer is **permitted** to request supporting documentation, but “**only when it is reasonable under the circumstances**” for the employer to determine whether the employee has a qualifying “limitation” and “needs an adjustment or change at work due to the limitation.” *Id.* § 1636.3(l)(1).
 - Interpretive Guidance, Section III ¶¶ 118-47; Exs. 54-55.
 - 29 C.F.R. § 1636.3(l)(1): When a request for certification is *not* “**reasonable under the circumstances**”
 - “Obvious” limitation that the employee self-confirms;
 - Employer already has sufficient information;
 - Employee is pregnant and seeks one of the four “reasonable assessments”;
 - The accommodation sought relates to pumping at work, and employee self-confirms; or
 - The requested accommodation is made available to others without requirement of submitting certification.
- Where an employer’s request for certification is “reasonable under the circumstances,” the employer **may only request “reasonable documentation.”** 29 C.F.R. § 1636.3(l)(2).
 - “*Reasonable documentation* means the minimum that is sufficient to:
 - Confirm the employee’s limitation;

- Confirm that the limitation is “related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions”; and
- Describe the accommodation needed.

Id. § 1636.3(1)(2)(i).

- N.B. the Final Rule seems to approve a fourth basis for seeking documentation: the anticipated duration of the accommodation. *See, e.g.*, Interpretive Guidance, Section III ¶ 138 (“The employer may also seek reasonable documentation to describe the adjustment or change at work that is needed due to the limitation *and an estimate of the expected duration of the need for the adjustment or change.*”) (Emphasis added.) *See also id.* (collecting examples); Exs. 54-55.
- 29 C.F.R. § 1636.3(1)(2)(ii): Employers “may not require that supporting documentation be submitted on a specific form.”
- *Id.* § 1636.3(1)(3): The Final Rule approves a wide range of health providers may submit supporting documentation. *Id.* § 1636.3(1)(3).
 - The provider submitting the documentation need not be the treating provider.
 - The provider may be a telehealth provider.
 - The employer may not require that the employee be examined by a provider selected by the employer.
- Interpretive Guidance, Section III ¶¶ 118-48; Exs. 54-55.
 - *Id.* ¶¶ 146-48: Interaction between PWFA and ADA with respect to medical certifications, including disability related inquiries.
 - “If there is a situation where an employee requests an accommodation and both the PWFA and the ADA could apply, the employer should apply the provision that it would be less demanding for the employee to satisfy.” *Id.* ¶ 148.
- Note the connection between requests for medical certification and the Final Rule’s directives regarding unlawful delays in responding to accommodation requests and/or the failure to provide interim accommodations. *See* Section VI, below.

VI. Discrimination with respect to accommodations, retaliation, and coercion

- The Final Rule includes invaluable detail concerning the various practices that will give rise to liability under the PWFA’s five forms of discrimination with respect to providing accommodations, 42 U.S.C. § 2000gg-1(1)-(5), as well as its prohibitions on retaliation and coercion. 42 U.S.C. § 2000gg-2(f).
- 29 C.F.R. § 1636.4 – Nondiscrimination with regard to reasonable accommodations

- Interpretive Guidance, Section IV ¶¶ 1-34; Exs. 56-60
 - Unnecessary delay, *id.* ¶¶ 3-7
 - Refusing accommodation, *id.* ¶ 8
 - Refusing accommodation based on failure to submit documentation, *id.* ¶ 9
 - Choosing among accommodations in a manner that deprives the worker of equal employment opportunity or otherwise violates the statute, *id.* ¶¶ 10-17; Exs. 56 & 59-60;
 - Requiring employee to accept accommodation other than one arrived at through interactive process, Interpretive Guidance, Section IV ¶¶ 18-22; Exs. 57-58;
 - Denying opportunities to qualified employees, Interpretive Guidance, Section IV ¶¶ 23-24;
 - Requiring qualified employee to take leave, *id.* ¶¶ 25-26; and
 - Taking adverse action on account of requesting or using an accommodation, *id.* ¶¶ 27-33.
- 29 C.F.R. § 1636.5(f)(1) – Prohibition against retaliation
 - Interpretive Guidance, Section V ¶¶ 5-10
- 29 C.F.R. § 1636.5(f)(2) – Prohibition against coercion
 - Interpretive Guidance, Section V ¶¶ 11-13
- *See also* Interpretive Guidance, Section V ¶¶ 14-15 (discussing other actions that may constitute retaliation and/or coercion, including unreasonable requests for documentation and disclosing – or threatening to disclose – medical information); *id.* ¶ 16 (discussing interaction of retaliation and coercion provisions with analogous provisions of Title VII and the ADA)
 - *Id.*, Exs. 61-76
 - *See also* U.S. Equal Employment Opportunity Commission, *Enforcement Guidance on Harassment in the Workplace* (Apr. 29, 2024), Section II.A.5.a., <https://www.eeoc.gov/laws/guidance/enforcement-guidance-harassment-workplace>:

Sex-based harassment under Title VII includes harassment based on pregnancy, childbirth, or related medical conditions. This can include issues such as lactation; using or not using contraception; or deciding to have, or not to have, an abortion. Harassment based on these issues generally would be covered if it is linked to a targeted individual’s sex including pregnancy, childbirth, or related medical conditions.

See also id., Exs. 11 (pregnancy); 12 (lactation); 13 (morning sickness).

VII. Relationship of PWFA to Other Statutes

- 29 C.F.R. 1636.7
- Interpretive Guidance, Section VI ¶¶ 1-22
 - PWFA is a floor, not a ceiling, *id.* ¶¶ 1-2
 - PWFA and Title VII, *id.* ¶¶ 4-6
 - PWFA and ADA, *id.* ¶¶ 7-20
 - No requirement that employers' health insurance covers any procedure, but that provision does not affect any right to such coverage pursuant to another federal, state, or local statute, and "nothing in the PWFA requires, or forbids, an employer to pay for health insurance benefits for abortion." *Id.* ¶ 21
 - Rule of construction regarding religious employers
 - Analyzed on a "case-by-case" basis. *Id.* ¶ 22 & n.206.

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Resources

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Please contact us if you would like to discuss your PWFA or PUMP case. We are available to help with framing and strategy, provide case law, review draft pleadings, and the like. Please contact Cynthia if you would like to become a member of the WLL Attorney Network, a free network for plaintiffs' lawyers who represent pregnant, breastfeeding, parenting, and caregiving employees.

Statutes and Regulations

Pregnant Worker’s Fairness Act, 42 U.S.C. § 2000gg,
<https://www.govinfo.gov/content/pkg/USCODE-2022-title42/pdf/USCODE-2022-title42-chap21G-sec2000gg-2.pdf> or <https://www.eeoc.gov/statutes/pregnant-workers-fairness-act>

PWFA regulations, 29 C.F.R. Part 1636,
<https://www.federalregister.gov/documents/2024/04/19/2024-07527/implementation-of-the-pregnant-workers-fairness-act#sectno-reference-1636.1>
Regulation starts at p. 29182, <https://www.federalregister.gov/d/2024-07527/p-1167>,
Appendix of interpretive guidance starts at p. 29189,
<https://www.federalregister.gov/d/2024-07527/p-1330>

PUMP Act, 29 U.S.C. § 218d, https://www.dol.gov/sites/dolgov/files/WHD/flsa/PUMP-act_hr2617.pdf

EEOC’s explanatory documents and Guidance

Summary of Key Provisions of EEOC’s Final Rule to Implement the Pregnant Workers Fairness Act, <https://www.eeoc.gov/summary-key-provisions-eeocs-final-rule-implement-pregnant-workers-fairness-act-pwfa>

What You Should Know About the Pregnant Workers Fairness Act,
<https://www.eeoc.gov/wysk/what-you-should-know-about-pregnant-workers-fairness-act>

Enforcement Guidance: Pregnancy Discrimination and Related Issues (2015):
<https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues>

Questions and Answers about the EEOC’s Enforcement Guidance on Pregnancy Discrimination and Related Issues (2015):
<https://www.eeoc.gov/laws/guidance/questions-and-answers-about-eeocs-enforcement-guidance-pregnancy-discrimination-and>

Enforcement Guidance on Harassment in the Workplace (2024),
<https://www.eeoc.gov/laws/guidance/enforcement-guidance-harassment-workplace>

Helpful websites and forms

Pregnant@Work, www.pregnantatwork.org

PWFA: Understanding Employer Obligations about Medical Certification, <https://pregnantatwork.org/wp-content/uploads/PWFA-Medical-Certification-Guidelines-for-Employers.pdf> (includes sample medical certification form)

Guidelines for Drafting Work Accommodation Notes (for healthcare providers), <https://pregnantatwork.org/wp-content/uploads/National-Doctors-Note-Guidelines-1.pdf> (includes sample notes and a chart of common pregnancy-related conditions and ideas for reasonable accommodation)

AskJAN (helpful for ADA/PWFA accommodation ideas), <https://askjan.org/>